Capacity Assessment and Record of Best Interests

GUIDANCE NOTES

These guidance notes summarise principles contained in the Mental Capacity Act 2005 and the Code of Practice.
In case of doubt, you should always consult the Code of Practice itself.

Core Principles

The Mental Capacity Act 2005 applies in England and Wales to everyone who works in health and social care and is involved in care.

- A person is assumed to have capacity. A lack of capacity has to be clearly demonstrated
- No one should be treated as unable to make a decision unless all practicable steps to help them have been exhausted.
- A person has the right to make what might appear to be an unwise decision. This does not necessarily mean they lack capacity.
- If it is decided a person lacks capacity then any decisions taken on their behalf must be in their best interests.
- Any decision taken on behalf of a person who lacks capacity must take into account their rights and freedom of action. The decision should achieve the person's best interests in the least restrictive manner possible.

Decision-maker

The decision-maker is the person who is deciding whether to take action in connection with the care or treatment of an adult who lacks capacity, or who is contemplating making a decision on their behalf:

- Where the decision relates to medical treatment, the doctor proposing the treatment will be the decision maker;
- If the person has a care manager or care co-ordinator, they will generally be the decision maker on general issues of welfare and finance;
- Where nursing care is provided and a decision about nursing care needs to be reached, the nurse will be the decision-maker;
- For most other day-to-day actions or decisions, the decision-maker will be the person must directly involved with the person at the time.

Outside hospital, the decision maker is likely to be a care worker or a family member concerning day to day actions.

Best Interests – the 7 statutory checklist points:

A decision-maker must bear all of the following in mind when reaching a decision as to best interests:

- Don't make assumptions about a person's best interests based simply on their age, appearance, condition or behaviour
- All relevant circumstances must be considered

- Is the person likely to regain capacity, and if so, can the decision wait until then? If possible the decision should be postponed to allow the person to make their own decision.
- Involve the person as fully as possible in making the decision
- Decisions concerning the provision or withdrawal of life sustaining treatment must not be motivated by a desire to bring about a person's death
- Past and present wishes and feelings of the person must be taken into account, together with and any relevant beliefs or values. These may be written in an advance decision (refusal of treatment) and / or an advance statement (advance care planning).
- There is a duty to consult with people close to the person, as far as is practicable and appropriate, when deciding upon best interests. The people listed below must be consulted with wherever possible and their views taken into account.

The decision-maker must weigh up all the information in order to determine what decision is in the person's best interests. Clear record keeping of the above is crucial.

Who should be consulted with when deciding best interests?

As far as possible you must consult with other relevant people if it is appropriate to do so and take into account their views as to what would be in the best interests of the person lacking capacity. In particular, if it is practicable and appropriate to do so you must consult with:

- anyone previously named by the person lacking capacity as someone to be consulted, e.g. in an advance statement
- carers, close relatives or close friends, or anyone else interested in the person's welfare
- any person involved from an independent advocacy organisation
- any attorney appointed under a Lasting Power of Attorney
- any attorney appointed under an Enduring Power of Attorney (where financial matters)
- any deputy appointed by the Court of Protection to make decisions for the person.

It may not be practicable or appropriate to consult a relevant person in certain cases: for example where a close family member lives abroad, or where an elderly patient has an elderly and frail spouse. However, a family member or other relevant person must never be deemed inappropriate to consult with merely because they disagree with the decision maker.

For decisions about serious medical treatment, or certain changes of accommodation, and where there is no one who fits into any of the above categories, you may need to instruct an Independent Mental Capacity Advocate (IMCA)

Can the decision be delayed because the person is likely to regain capacity in the near future?

Careful consideration needs to be given to whether a person is likely to regain capacity in time to reach their own decision. For example, is the person's understanding better at different times of the day or in particular contexts? Are they able to make decisions when they are in a comfortable environment, perhaps with loved ones in attendance? Consider also the effects of medication over the course of the day and try to obtain a decision from the person at the time they are best able to respond.

Independent Mental Capacity Advocate (IMCA)

An IMCA is a specific type of advocate that will only have to be involved if there is no one close to the incapacitated person, other than a paid carer, with whom it is practicable and appropriate to

consult. An IMCA is not a decision-maker, but the decision-maker will have a duty to consult with the IMCA and to take into account any opinions or information given by the IMCA during consultation.

An IMCA **must** be instructed if:

- the decision is about "serious medical treatment" provided by the NHS, **or**
- it is proposed that the incapacitated person be moved into long-term care of more than 28 days in a hospital or 8 weeks in a care home or other care setting (e.g. an adult placement), **or**
- a long-term move (8 weeks or more) to different accommodation is being considered, for example, to a different hospital or care home, **and in any of these 3 cases**
- there is no one close to the incapacitated person other than a paid care with whom it is practicable and appropriate to consult in deciding best interests.

An IMCA **may** also be instructed in:

- a care review regarding an incapacitated person, or
- an adult protection case that involves a vulnerable incapacitated person

where the decision-maker is satisfied that having an IMCA will be of particular benefit to the person who lacks capacity

Lasting Power of Attorney (LPA)

A Lasting Powers of Attorney (LPA) allows a person aged 18 or over to formally appoint someone to take health, welfare and/or financial decisions on their behalf if at some time in the future they lack the capacity to make these decisions for themselves. The person appointed will be known as an attorney. The LPA will give the attorney authority to make decisions on behalf of the donor and the attorney will have a duty to act or make decisions in the best interests of the person.

- A personal welfare LPA grants the authority to the attorney to take decisions about both health and personal welfare;
- A property and affairs LPA grants the authority to the attorney to take decisions in relation to property and financial matters.

A personal welfare attorney will be the decision-maker on matters relating to an incapacitated person's care and treatment. However the attorney can only take decisions within the scope of their authority. Also the attorney will only have authority to take decisions concerning life sustaining treatment where this authority is specifically granted to them in the LPA document. It is essential to read (and keep copies of) the LPA document in order to clarify the extent of the attorney's power.

If there is a dispute between healthcare professionals and an attorney that cannot be resolved locally (e.g. where there is evidence that the attorney is not acting in the clients best interests or not following the Code of Practice) then a discussion should take place with a line manager or the wider care team to decide whether the Public Guardian should be requested to investigate.

Deputy appointed by Court of Protection

A deputy appointed by the Court of Protection will have the authority to make ongoing decisions concerning a person who lacks capacity. The Court of Protection will have defined the extent of the deputy's authority to take decisions, and the scope of the deputy's authority will be made clear in the sealed court order that appointed them.

A court-appointed deputy will be the decision-maker on matters relating to an incapacitated person's care and treatment where they have been granted the specific authority to take these decisions. If there is a dispute between healthcare professionals and a deputy that cannot be resolved locally (e.g. where there is a concern that the attorney is not acting in the clients best interests or not following the Code of Practice) then a discussion should take place with a line manager or the wider care team to decide whether the Public Guardian should be requested to investigate.

General Advocate

A general advocate is a person from an independent Advocacy Project or Service who listens to service users and gives them support to express their views. General advocates can help service users in a range of ways, for example: by ensuring they have access to information to make choices; by attending meetings to support service users and to ensure they are listened to; discovering what service user's choices are. They can also be requested to provide independent views of "best interests" for people who lack capacity if there are differences of views and would be expected to provide a written brief report of their recommendations.

Disputes

Sometimes there might be disagreement or dispute as to what would be in the best interests of an incapacitated person, for example between clinicians and family members. In the event of a dispute staff should seek local resolution if at all possible. The following may assist the decision maker to resolve the dispute:

- Involve an advocate who is independent of all parties involved;
- Get a second opinion as to capacity and/or best interests;
- Hold a strategy meeting of all involved;
- Consider mediation.

Where local resolution of a dispute is not possible despite all efforts of the decision-maker, consider with line management whether a legal perspective should be obtained. Physical attendance of a lawyer at strategy meetings should be a last resort and only after agreement of senior managers. The Court of Protection has jurisdiction to resolve disputes as to the capacity and/or best interests of an incapacitated person, and an application to the Court might be necessary in a serious case.

When should the form MC1 be filled in?

A best interests decision needs to be taken in every case where a course of action is proposed for a person who lacks the capacity to consent to that course of action. This includes all aspects of the care and treatment of such a person.

However not all best interests decisions need to be formally recorded. In general terms, best interests decisions concerning matters of day to day personal care and normal activities of daily living for an incapacitated person will not normally need to be formally recorded. Examples might

include choosing what clothes the person should wear on a cold day, or deciding what the person should eat for lunch.

All other more significant best interests decisions must be fully recorded using Form MC1 in and associated guidance. The following are some examples of best interests decisions that must always be formally recorded on Form MC1:

- All decisions as to the care and treatment (beyond matters of day to day personal care and normal activities of daily living) of a mentally incapacitated voluntary patient
- Medical treatment for a detained patient where the proposed treatment is not for their mental disorder or any symptom of their mental disorder;
- Care planning and mental health treatment decisions for a voluntary patient;
- Decisions as to ongoing care which will be subject to future review;
- Decisions which may involve restricting the liberty of a voluntary patient, such as those around high level observations;
- Issues of dispute with family members or other interested parties;
- Changes of accommodation for voluntary patients or on discharge from detention.

The Form MC1 should be completed each time a new best interests decision is required. This will be include each time there is a change in the proposed treatment regime or care plan for a mentally incapacitated voluntary patient. Unless there are major changes in capacity or proposed interventions only one form should be completed per admission with minor changes being recorded in routine clinical notes.

What should be recorded for clients whose capacity fluctuates?

Fluctuating capacity will be an issue for many clients but especially in mental health. In such cases staff should record in their initial assessments that this could be the case stating how their practice would change in such an event e.g. postponing therapy, liaising with key carers, recording the change in capacity and how continued intervention confers with the best interest checklist. The best client centred practice will clearly be to agree the response with the client and family in advance whilst the client still has capacity.